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U.S. Department of Justice

Immigration and Naturalization Service

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

File: LIN 01 148 55205 Office: NEBRASKA SERVICE CENTER Date: JUN 18 2002

IN RE: Petitioner: [redacted]
Beneficiary:

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(3)

PUBLIC COPY

IN BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Helen E Crawford for

Robert P. Wiemann, Director
Administrative Appeals Unit

DISCUSSION: The employment-based preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a nursing home and rehabilitation center. It seeks to employ the beneficiary permanently in the United States as a physical therapist. The petitioner asserts that the beneficiary qualifies for blanket labor certification pursuant to 20 C.F.R. 656.10, Schedule A, Group I. The director determined that the petitioner had not established that the beneficiary holds a full and unrestricted (permanent) license to practice as a physical therapist in the state of intended employment.

On appeal, counsel argues that the beneficiary is qualified for a license to practice physical therapy in New York State.

Section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(3), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled or unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States. This section also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

In this case, the petitioner has filed an Immigrant Petition for Alien Worker (Form I-140) for classification under section 203(b)(3)(A)(i) of the Act as a skilled worker (physical therapist). Aliens who will be employed as physical therapists are listed on Schedule A. Schedule A is the list of occupations set forth at 20 C.F.R. 656.10 with respect to which the Director of the United States Employment Service has determined that there are not sufficient United States workers who are able, willing, qualified and available, and that the employment of aliens in such occupations will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer shall apply for a labor certification for a Schedule A occupation by filing an Application for Alien Employment Certification (Form ETA 750 at Part A) in duplicate with the appropriate Immigration and Naturalization Service office. The Application for Alien Employment Certification shall include:

1. Evidence of prearranged employment for the alien beneficiary by having an employer complete and sign the job offer description portion of the application form.

2. Evidence that notice of filing the Application for Alien Employment Certification was provided to the

> bargaining representative or the employer's employees as prescribed in 20 C.F.R. 656.20(g)(3).

In this case, Form I-140 was filed on April 6, 2001. On May 30, 2001, the director requested that the petitioner submit evidence that the beneficiary is qualified to take the state of intended employment's written licensing examination for physical therapists, or submit evidence that the beneficiary is licensed as a physical therapist in the state of intended employment.

In response, counsel submitted a copy of a letter from Continental Testing Services, Inc. which stated that they received an application from the beneficiary to take the examination.

The director denied the petition noting that "the evidence submitted does not establish that Continental Testing Services, Inc. is an authorized state physical therapy licensing official for the state of Illinois nor does the evidence establish that the beneficiary is qualified to take that state's written licensing examination."

On appeal, counsel argues that:

> It should be noted that [the beneficiary] came to the USA through an H-1B visa petition by New York City Health & Hospitals Corporation (NYCHHC) and in fact she worked for the city hospital, i.e. Seaview Hospital Rehab Center & Home in Staten Island, New York from June 1994 - May 1996. At that time, she was issued a Limited Permit to practice physical therapy by New York State Education Department (copies of her Limited permits are hereto attached). Also, attached is a letter from the State of New York/Albany, New York stating that she is qualified for a license to practice physical therapy in New York and was further advised that her education has been accepted as meeting the education requirement for admission to the licensing examination.

Employment-based petitions are based on priority dates. The priority date is established when the petition is properly filed with the Service. 8 C.F.R. 204.5(d). The petition must be accompanied by the documents required by the particular section of the regulations under which submitted. 8 C.F.R. 103.2(b).

The petition was not accompanied by evidence that the beneficiary qualifies for classification pursuant to 20 C.F.R. 656.10, Schedule A, Group I, at the time the petition was filed. As the petitioner had not complied with the instructions stipulated in the Department of Labor regulations, at the time of filing of the petition, the petition may not be approved.

It is further noted that even though the beneficiary worked and had a limited license to practice in New York State, she is not qualified to work in Illinois, the state of intended employment.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not met that burden. The appeal will be dismissed.

ORDER: The appeal is dismissed.